Supreme Court, U.S.
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No. 98-291

In The

Supreme Court of the United States

October Term, 1997

ROBERT G. MORRIS,

Petitioner,

v.

SANDRA L. MORRIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEVIN P. SHAY
KEVIN P. SHAY, PLLC
Attorney for Respondent
Counsel of Record
14350 Northbrook, Suite 220
San Antonio, Texas 78232
Tel. No. (210) 497-6300
Fax No. (210) 497-6333

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OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Respondent initiated this case at the trial level to enforce the Property Settlement and Divorce Agreement entered into by the parties at the time of their divorce on May 23, 1984. The Property Settlement and Divorce Agreement was incorporated into the Divorce Decree entered as a judgement by the 216th Judicial District Court of Kendall County, Texas. Based upon evidence presented at trial, the trial court, interpreting the meaning of certain language in the Property Settlement and Divorce Agreement, found that the parties had agreed to split Petitioner's "gross military retirement benefits" 50% to each. The trial court concluded as a matter of law that the Divorce Decree was a final judgement.

Petitioner has argued at trial and on appeal that federal law preempts the trial court's interpretation of the Divorce Decree (Property Settlement and Divorce Agreement). The Texas courts have ruled against this argument based upon *res judicata*, to wit: Petitioner's argument for federal preemption is a collateral attack of a final judgement and therefore barred.

PRECEIVED MISSTATEMENTS OF FACTS AND LAW

Petitioner states in his STATEMENT OF THE BASIS FOR JURISDICTION OF THE COURT that "The case involved a federal question, to wit: the interpretation of 10 U.S. Code Section 1408, a federal statute." In fact, the case at the trial level involved interpretation of language of the prior final Divorce Decree. The Uniformed Services Former Spouses' Protection Act, 10 U.S. Code Section

1408 et seq. ("USFSPA") was not applied to this case because to do so would have in effect been a retroactive application of such federal statute to a final judgement.

Petitioner states that Respondent accepted the reduced retirement benefits from Petitioner after he took a civil service job in 1986. Beginning immediately after the Divorce, Petitioner sent Respondent monthly checks for retired pay based upon the top line or gross retirement benefits shown on the retired pay statements Petitioner received from the Air Force until 1986 (Tr. at 52). Until Respondent received copies of Petitioner's retired pay statements he received from the Air Force for the years 1991 and 1992, Respondent had not received any information from Petitioner from which she could independently calculate the amounts due to her (Tr. at 14). Respondent testified that she had expressed opposition to Petitioner's reduction of the amount paid to her and had requested information about the retirement benefits after the reduction (Tr. at 18-19).

Petitioner states that the trial court ignored the limitations of "disposable" retired pay imposed by the federal statute. To the contrary, the trial court was only interpreting the prior final judgement, when, based upon evidence presented at the trial, he found that the parties had agreed to the 50% split. The trial court had no authority to apply the USFSPA retroactively to the final judgement of the 1984 Divorce Decree.

REASONS FOR DENYING THE WRIT

That part of the trial court's ruling that Petitioner is appealing is an interpretation of the meaning of the Petitioner's and Respondent's Divorce Decree entered on May 23, 1984. Petitioner's argument is a collateral attack on a final judgement. The Petitioner did not appeal the Divorce Decree and it is final. The trial court, based upon evidence presented at trial, interpreted the meaning of the Divorce Decree. Evidence was presented at the hearing to prove the understanding and agreement of the parties with respect to the meaning of the language in question. The trial court found, based upon the evidence, that it was the agreement of the parties that Petitioner was to pay Respondent 50% of the "gross" retirement benefits. (Findings of Fact No. 8, Findings of Fact and Conclusions of Law at 2).

Petitioner argues that *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), should be applied retroactively to collaterally attack a valid final Texas judgement. In the *Mansell* decision, the U.S. Supreme Court specifically left the determination of retroactive application of the USFSPA the state courts. *Mansell*, 490 U.S. at 586 footnote 5. The federal question in *Mansell* was properly before the U.S. Supreme Court because of a prior California Court's ruling "that it was appropriate, under California law, to reopen the settlement and reach the federal question." The Texas Supreme Court in *Berry v. Berry*, 786 S.W. 2d 672 (Tex. 1990) refused to apply the ruling of the U.S. Supreme Court in *Mansell* to retroactively invalidate a final judgement in Texas.

As the Texas Supreme Court so wisely determined in *Berry*, to allow retroactive application of the U.S. Supreme Court's *Mansell* decision to a final Texas divorce judgements would work an unjust hardship upon the non-military ex-spouse. Otherwise the military ex-spouse could unilaterally decide to change the amount the non-military ex-spouse receives by accepting civil service employment. The military ex-spouse receives the full pay from the civil service employment, but both spouses receive less from the military retirement pursuant to the USFSPA, and because the divorce judgement is final the non-military spouse would be left with no legal recourse. Essentially, those are the facts in this case. This would be an unjust result.

CONCLUSION

Petitioner's appeal is a collateral attack upon a valid final Texas judgement and does not merit further review by this Court. For the reasons above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KEVIN P. SHAY
KEVIN P. SHAY, PLLC
Attorney for Respondent
Counsel of Record
14350 Northbrook Drive, Suite 220
San Antonio, Texas 78232
Tel. No. (210) 497-6300
Fax No. (210) 497-6333